Supreme Court, U.S.
FILED
JUL 3 2001
OFFICE OF THE CLERK

No. 00-1741

In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, and CITIZENS FOR I-125,

Respondents-Intervenors.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Petitioners here are Communities for a Great Northwest and Northwest Mining Association (collectively, "the Communities"). There are two distinct groups of Respondents: one consists of the Montana Commissioner for Political Practices and the Montana Secretary of State ("State Respondents");[1] the other consists of various outfits that supported both the gag law (I-125) and the mining initiative (I-137) ("Private Respondents"). Each group of Respondents filed an opposition to the Communities' petition, to which the Communities reply in this single brief, referring to both groups collectively as "Respondents."

The bulk of Respondents' briefs is devoted to rehashing Judge Lovell's factual determination that the Communities' political speech was silenced. *E.g.* State Resp. 7, 10; Pvt. Resp. 12-15. Such armchair retrials have no place in this Court, especially given that the finder of fact rejected the testimony on which Respondents rely. Moreover, closer inspection of that testimony reveals that Judge Lovell was correct: the gag law suppressed speech. It was therefore unconstitutional. As a result, because the unconstitutional gag law tainted the referendum on the mining initiative, adoption of the mining initiative too is unconstitutional. *Certiorari* is necessary to consider this doubled-barrel assault on the First Amendment.

As for legal arguments, Respondents begin with the fallacious assumption that the Communities seek review of Judge Lovell's refusal to invalidate an election that had occurred already. State Resp. 5; Pvt. Resp. 8. In reality, however, the petition clearly states, and it is quite apparent from the procedural history of this matter, that the Communities seek review of Judge Lovell's unexplained

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[1] State Respondents correctly point out that, by operation of law, Linda Vaughey and Bob Brown have replaced former Commissioner of Political Practices Ed Argenbright and former Secretary of State Mike Cooney, respectively.

refusal to prevent the vote on this single ballot initiative from occurring in the first place or from taking effect. Pet. 6-8. Thus, Respondents' attempt to recast the question to avail themselves of different, more onerous rules that apply to post-election challenges fails.

First, Respondents contend that the Communities' challenge was a post-election challenge and therefore untimely. Pvt. Resp. 8; *See* State Resp. 9 n.2. This argument fails as a matter of common sense and as a matter of law. The trial ended and Judge Lovell ruled, nearly two weeks before Election Day. Therefore, Judge Lovell had more than enough time to order the State of Montana to postpone the vote on the mining initiative. His inexplicable failure to do so does not mutate this case into a post-election challenge. Nor does it moot the question of pre-election relief. On the contrary, the controversy regarding Judge Lovell's tautological orders is still very much alive. In addition, no authority supports Respondents' timeliness argument when applied to challenges filed and decided well before the election.

Second, Respondents assert that only Fifth Amendment substantive due process violations can justify the relief the Communities seek. State Resp. 7; Pvt. Resp. 11. In Respondents' view, for example, total suppression of all political speech throughout an entire election season would not be grounds for postponement or invalidation of the election unless registered voters were somehow denied the ability to have their votes counted. This is absurd; therefore, the argument is invalid.

Third, after expending much energy pointing out the dearth of authority for preventing or invalidating elections for First Amendment violations, Respondents proceed to characterize this case as "a routine application of the abuse of discretion standard." Pvt. Resp. 8; *See* State Resp. 16. Thus, Respondents contradict themselves. *Certiorari* and reversal are necessary either because the Ninth Circuit radically departed from what should have been the routine granting of relief for suppression of political speech during an election, or because the time has come for this

Court unequivocally to establish routine relief for such a violation of the First Amendment.

I. Respondents' Rehashing Of Judge Lovell's Factual Determinations Has No Place In This Court, Especially Since The Trier Of Fact Rejected The Evidence On Which Respondents Rely.

Great swaths of Respondents' briefs are devoted to factual allegations directly contrary to Judge Lovell's factual determinations. Most tellingly, Respondents allege that corporations all over Montana "made a concerted effort *not* to participate in the campaign against [the mining initiative] in order to influence the district court regarding the onerousness of [the gag law]." State Resp. 8 (emphasis in original); Pvt. Resp. 15. That is Respondents' interpretation of a single sentence uttered, under cross examination, by former Montana Secretary of State Mike Cooney. Asked whether the electorate was "getting less information pro or con about the seven initiatives" on the ballot for the upcoming election, Mr. Cooney replied, vaguely, "there are people who are using this dispute . . . to make a statement about [the gag law]." Resp. App. at 61. In other words, Mr. Cooney offered his conclusory, self-serving opinion that the electorate was getting less information because of the gag law, but, contrary to Respondents' accusation, he did not allege "sandbagging." In any event, there is no indication whatsoever that Judge Lovell, as the trier of fact, put any credence in this tiny bit of unsupported, conspiratorial speculation. Instead, Judge Lovell's holding demonstrates that he did not believe Mr. Cooney. Mr. Cooney's testimony is therefore no reason to deny *certiorari*.

Respondents' factual allegations also include further, irrelevant speculation about what various entities could or should have done to exercise whatever meager free speech rights were left to them. For example, Respondents suggest several useless actions the Montana Mining Association (MMA) could have taken solely with regard to its members, such as soliciting funds from them and sending

newsletters to them. State Resp. 8; Pvt. Resp. 13. Respondents conveniently ignore that the gag law prohibited donations from MMA's corporate members, who comprise the bulk of MMA's membership. State Resp. 8; Pvt. Resp. 4. Furthermore, as State Respondents recognized, State Resp. 6, the MMA only had 450 members, State Resp. App. 28, whereas Montana had 639,241 registered voters in 1998. *http://www.state.mt.us/sos/assets/elections/98gen/98gen.htm*; Pet. 6-7 n.7. MMA members were well aware of the impact of the mining initiative; they did not need to hear from the MMA why it would kill jobs in Montana. Registered voters needed to hear that message, but, under the gag law, MMA could not tell them. This Court does not require anyone to engage in the futile exercise suggested by Respondents as a prerequisite to challenging a ban on political speech during an election.

Similarly, Respondents recite irrelevant testimony regarding MMA's and Montana Education Association's campaign expenditures before and during the enforcement of the gag law. State Resp. 7; Pvt. Resp. 5. These observations are irrelevant here because there is no evidence that the ballot initiatives opposed by either of these organizations in the past were sufficiently similar in popularity and backed by sufficiently similar proponents with sufficiently similar budgets and strategies. Most importantly, however, Judge Lovell did not find the testimony probative! Respondents' attempt at an armchair retrial is no reason to deny *certiorari*.

II. *Certiorari* Is Warranted, Despite Respondents' Misplaced Reliance On Inapposite Cases And Judge Lovell's Own Tautologies, Because The Communities' Timely Challenge Reached Final Decision Nearly Two Weeks Before Election Day.

Respondents' first legal argument is that the Communities waited too long to sue and, as a result, are not entitled to relief. Pvt. Resp. 17; State Resp. 10. This argument is grounded upon Respondents' absurd view that the Communities somehow waived or abandoned their rights

to free speech. Moreover, in light of Judge Lovell's praise for the Communities' success in assembling a cogent case such that he could decide the matter well in advance of Election Day, App. 7, this argument falls flat. Finally, the equally important – or more important – right of the electorate to hear speech could not have been waived. Pet. 13.

Respondents' timeliness argument also fails for lack of authority. For their assertion that this case was untimely, Respondents rely on Judge Lovell's decision in *Montana Mining Association v. Simonich*, CV 98-48-HCCL (D. Mont. March 19, 1999).[2] The Communities were not party to that case, however, and it was filed the day after the election. Pvt. Resp. App. 1-2. In stark contrast, the Communities, in this case, had sued months earlier. The *Simonich* decision is therefore irrelevant. Furthermore, comparison of Judge Lovell's decisions in this case and in *Simonich* crisply depicts the circularity of his logic. In *Simonich*, he ruled that unexplained failure to file suit before Election Day rendered the suit untimely. Pvt. Resp. App. at 14. But in the present case, amazingly, he denied the Communities' motion to enjoin the election because the election had not yet occurred. "Who knows?" They might win, he said and never elaborated one word further. Pet. 6-8, 26 n.7. *Certiorari* is required because this Court cannot allow Judge Lovell or Respondents to have both sides of this argument when survival of political speech in a ballot election, pursuant to the First Amendment, hangs in the balance. Pet. 11-14.

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[2] State Respondents also contend, in a footnote, that the *Simovich* decision "lays out in great detail [Judge Lovell's] reasons for denying" relief in the present case. State Resp. 9 n.2. Given that the Communities were not even parties to the *Simovich* case, State Respondents' assertion is problematic at best. In addition, the *Simovich* decision details only a latches argument in that post-election challenge. It is inapposite here, where Judge Lovell's final decision predated Election Day by nearly two weeks.

III. *Certiorari* Is Necessary, Despite Respondents' Absurd Contention That Only Substantive Due Process Violations Can Justify Relief, Because Severe, Late-Season Suppression Of Political Speech Surely Warrants Brief Postponement Of An Election.

Respondents characterize this case as a question merely of spending money (albeit to engage in speech and to spread the Communities' views to Montana's voters), as though the Communities sought only to buy office supplies. State Resp. 7; Pvt. Resp. 11. There can be no doubt, however, that expenditure of funds on a ballot campaign prior to an election is political speech that commands the full attention of this Court. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 n.9 (1986) (Brennan, J., for the Court) ("the activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment").

Nevertheless, Respondents contend that only substantive due process violations, not First Amendment violations, can justify the relief sought by the Communities. State Resp. 6; Pvt. Resp. 10. State Respondents argue that the mining initiative should continue to encumber the Communities' livelihood because "[n]o potential voters were disenfranchised, no improper ballots were cast or counted, and no established election procedures were ignored." State Resp. 6, 17. Similarly, Private Respondents insist, "invalidating the [mining initiative] election is not remotely justified [because] . . . no . . . Montana voter was prevented from casting a ballot . . . and there are no special circumstances such as fraud or egregious racial discrimination. . . . " Pvt. Resp. 10-11.

A moment's thought dispels these contentions thoroughly. Respondents' contention that the total abridgement of political speech during an election campaign is not an "egregious" constitutional violation must be rejected. For in Respondents' ridiculous view, even if the FCC were to block all broadcasts opposing reelection of the President, there would be no legal grounds for postponing the

election as long as registered voters were allowed to vote and their votes were counted. In fact, Respondents would insist that judicial relief from such a bar on political speech would be unavailable, even if this insidious action: were announced on Memorial Day; went into effect on Independence Day; were challenged on Labor Day; and were struck down after a full trial eleven days before Election Day. (The chronology bears a deliberate resemblance to this case.) Such results are self-evidently absurd. Although there has been no substantive due process violation either in this scenario or in this case, there has been a rather obvious violation of the rights to utter and to hear political speech. Consequently, it should also be obvious that elections, in which political speech has been selectively suppressed as it was here, should be postponed until free and full debate can occur. Respondents' substantive due process argument therefore is no bar to the granting of *certiorari*.

In support of their absurd contentions, moreover, Respondents cite only post-election challenge cases, or cases in which the district court did, in fact, enjoin or invalidate a normally scheduled election until the court was satisfied that it could be conducted constitutionally, such as *Connor v. Williams*, 404 U.S. 549, 550 (1972) and *Cook v. Luckett*, 735 F.2d 912, 915 n.3, 923 (5th Cir. 1984), respectively.[3] State Resp. 6; Pvt. Resp. 9-10. The present

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[3] In *Cook*, the district court enjoined the vote after a pre-election challenge. *Cook v. Luckett*, 575 F.Supp. 479 (S.D. Miss. 1983). Later, the district court permitted the election to take place, but only after the court had approved the districting plan. 735 F.2d at 917. Later still, the Fifth Circuit vacated "such part of the lower court's injunction as may now remain in force," but did not invalidate the election. It chose not to do so, however, because, as it wrote, "we are unsure whether the [challenger] urges us to upset the elections." *Id.* at 921. The Fifth Circuit's refusal to overturn the election in *Cook* therefore has no importance in the present case, where there is no doubt the Communities seek restoration of the *status quo ante*.

case, of course, is a pre-election challenge and Judge Lovell should have enjoined the vote as the *Cook* court did. *Certiorari* is necessary as a result.

IV. Even If Respondents Were Correct That There Is No Authority For Postponing Elections Due To Campaign-Season Suppression Of Political Speech, This Court Should Grant *Certiorari* To Ensure Protection Of The First Amendment.

Finally, after their vigorous attempt to demonstrate a dearth of precedent for granting the relief sought, Pvt. Resp. 9-11, Respondents paradoxically assert that this case presents a "routine application of the abuse of discretion standard," Pvt. Resp. 8. In other words, they contend Judge Lovell's completely unexplained refusal to grant relief was a perfectly common "blend of what is necessary, what is fair, and what is workable." *Id.* at 16. Both contentions – that this case is rare and that it is common – cannot be true simultaneously. If there were no authority on point, then campaign-season abridgement of the rights to utter and to hear political speech cannot be routine. If it were routine, then there would be abundant case law on point.

In reality, there is ample authority for relief: this Court's own decisions. Although the Communities themselves pointed out that no case before has presented a situation precisely like this one, Pet. 28, an absence of identical fact patterns is hardly the same as a total lack of controlling authority. Rather, as the Communities detailed at great length, this Court has made clear that the First Amendment must be protected or the entire constitutional system could fall. Pet. 11-14. In this case, all courts below have agreed that unconstitutional suppression of speech tainted the election and that this challenge was filed and decided before the election, but the courts allowed the election to proceed and to take and remain in effect anyway. Consequently, *certiorari* is necessary to correct the Ninth Circuit's failure to comply with

this Court's teachings regarding the sanctity of First Amendment protected speech.

Even if this Court's decisions were convincingly distinguishable, moreover, this case presents anything but a routine exercise of discretion. Respondents' protestations to the contrary are baseless. Attempting to demonstrate the propriety of Judge Lovell's denial of relief, State Respondents allege, again without benefit of citation to the record, that Judge Lovell "determined": "that invalidating the [mining initiative] election . . . was not necessary"; "that invalidating the [mining initiative] election . . . would not be fair to the Montanans that cast their votes in good faith support of it"; and "that invalidating the [mining initiative] election . . . would not be workable under the circumstances." Resp. at 16, *citing Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). These contentions are completely unsupported in the record, which explains why Respondents did not cite it. In fact, as described in great detail in the Communities' petition, Judge Lovell made no findings whatsoever with regard to the mining initiative election, other than that if the Communities won the election, there would be no need for him to intervene. Pet. 5-8, 26 n.7. Instead, Judge Lovell devoted his entire decision regarding the gag law to his factual finding that the Communities had been "silenced" and to his legal conclusion that such suppression of speech is unconstitutional.

Truly proper application of the "necessary, fair and workable" test actually favors *certiorari*. First, there can be no doubt that it is "necessary" to protect political speech. Pet. 11-14. Next, all courts in this case have agreed that it was not "fair" – in fact, it was unconstitutional – to gag the Communities during the election campaign. Even if it were true that unfairness would result to voters who voted "in good faith," as Respondents contend without benefit of citation to the record or to authority, this Court has never held that voting "in good faith" may be balanced against, and held superior to, the right to engage in and hear political speech in an election

campaign. On the other hand, it is beyond dispute that this Court has held that protection of political speech is absolutely necessary to ensure that voters are informed before they vote. Pet. 11-14. In fact, if "fairness," rather than a constitutionally untainted election, is the goal, it would be more fair to allow the Montana electorate to vote again, after a free and full opportunity for public debate. Finally, postponement of the vote on the mining initiative was surely "workable," and remains so. Pet. 23 n.6. Judge Lovell could have required a delay, as the Communities first requested, or easier still, he could have allowed the election to proceed but enjoined certification of the mining initiative election results, as the Communities requested next. Then, Judge Lovell could, and should, have left it up to the State of Montana to reschedule the vote for whenever it saw fit, so that Montana could make its own judgment about costs and timing – subjects on which the record is completely silent. *Marks v. Stinson*, 19 F.3d 873, 889-90 (3rd Cir. 1994); Pet. 23 n.6. Because Respondents' arguments as to "necessary," "fair," and "workable" are not supported by the record or case law and, in fact, conflict with the holdings of Judge Lovell as to the facts of this case and of this Court as to the sanctity of political speech, *certiorari* should be granted.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Communities' petition for *certiorari*.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD, INC. AND CONTINENTAL LIME, INC., Plaintiffs, v. ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State, Defendants.	CV 98-37-H-CCL COMPLAINT FOR DECLARATORY RELIEF (Filed Sep. 1, 1998)

NOW COME the Plaintiffs, by and through their respective counsel, and seek an order of declaratory judgment pursuant to 28 U.S.C. § 2201-02, finding that § 13-35-227, MCA, (as amended by Montana Initiative I-125 and modified by a subsequent order of this Court) is unconstitutional as applied to Plaintiffs in that it impermissibly restricts their First Amendment rights of free speech and freedom of association with respect to Plaintiffs' desire to oppose Montana Ballot Initiative I-137, an

initiative currently certified and on the ballot for the November 1998 general election.

* * *

> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:
>
> (a) does not engage in business activities;
>
> (b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;
>
> (c) does not accept foreign or domestic for profit corporations as members; and
>
> (d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for profit corporations.

§ 13-35-227, MCA.

47. Defendant Commissioner has stated that he will enforce I-125 against for-profit corporations or not-for-profit corporations (such as Plaintiffs) if they, or other business entities or organizations similarly situated to them contribute directly to a campaign committee opposing or supporting a ballot issue or directly make an expenditure for or against a ballot issue. (*See* attached letter from Commissioner Argenbright as Ex. B).

COUNT I

FREEDOM OF SPEECH, EXPRESSION AND ASSOCIATION

48. Plaintiffs reallege, and incorporate as though fully set forth herein paragraphs 1-47 of this Complaint.

49. The Plaintiffs, and their respective for-profit and not-for-profit members have a constitutionally protected right to engage in political speech and association and to make contributions and expenditures in support of or in opposition to ballot issues.

50. The degree of protection afforded to the Plaintiffs constitutionally protected rights of free speech and association is heightened when their assets and way of life are threatened, as they are by the proposed initiative.

51. The threatened enforcement of the civil penalties for violating I-125, forces Plaintiffs to choose between either engaging in their rights of free speech and association to protect their economic interests (thus facing civil enforcement proceedings against them) or foregoing the exercise of those rights to avoid such enforcement proceedings and risk the loss of assets and a way of life.

52. I-125 impermissibly chills the Plaintiffs' rights to engage in political speech and association.

53. I-125, therefore, abridges the First Amendment rights of the Plaintiffs and their respective for-profit and not-for-profit corporate members.

WHEREFORE, Plaintiffs request relief as follows:

1) That the Court order such preliminary injunctive relief as may be requested by separate application therefore;

2) That the Court issue a declaratory judgment ruling and order which declares I-125 to be a violation of the United States Constitution's First Amendment right to free speech as applied to Plaintiffs or other persons, corporations or associations similarly situated, together with a permanent injunction against enforcement of I-125; and

3) That the Court provide such other and further relief as this Court deems proper under the circumstances.

Respectfully submitted this 1st day of September, 1998.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

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MOUNTAIN STATES LEGAL FOUNDATION

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One of the Attorneys for Plaintiffs
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Communities for a Great Northwest,
Ltd. Yellow Band Gold, Inc. and
Continental Lime, Inc.

CHRISTENSEN, MOORE, COCKRELL & CUMMINGS, P.C.

/s/ Dale R. Cockrell
One of the Attorneys as Local Counsel for Plaintiffs MMA, NWMA, CGN, Yellow Band Gold & Continental Lime, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

v.

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendant-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

* * *

October 22, 1998

Page 241, Line 15

THE COURT: Thank you.

The matter then is deemed submitted to the court for decision.

* * *

Page 244, Line 9

I want to thank the lawyers in both cases. I didn't dream that you could present the volume and the quality of evidence that's been brought forth here. It is surprising to me.

I also appreciate the way that you've cooperated with each other to get these cases before the court and get them decided. It is unusual that a case such as the mining case here can be filed one month, tried the next month, and decided that same month.

Court's adjourned.

(The proceedings in this matter were adjourned at 10 p.m.)